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Supreme Court, U.S.
FILED
AUG 30 1999
OFFICE OF THE CLERK

No. 99-163

IN THE

Supreme Court of the United States

CYNTHIA AND ROBERT BAGLEY, GARY AND CYNTHIA ST. PIERRE, DENNIS AND PATRICIA COLE, RICKY AND MARY THORNTON, AND JACK AND STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court Sitting as the Law Court

BRIEF IN OPPOSITION OF RESPONDENTS TIMOTHY HUMPHREY, *ET AL.* AND MAINE CIVIL LIBERTIES UNION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF IN OPPOSITION OF RESPONDENTS TIMOTHY HUMPHREY, *ET AL.* AND MAINE CIVIL LIBERTIES UNION

Respondents Timothy Humphrey, *et al.* and Maine Civil Liberties Union, defendants-intervenors in the proceedings below, submit this Brief in Opposition to the Petition for a Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

The State of Maine requires all school districts to provide a free kindergarten through twelfth grade education

to its residents. 20-A M.R.S.A. § 1001(8). School districts may fulfill this statutory obligation by operating their own public schools, or by paying the tuition incurred by resident families in sending their children to public or approved private schools, pursuant to the State's education tuition program ("voucher program"). Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 1-2.[1]

Approximately half of the school districts in Maine satisfy their statutory obligation by operating public elementary and secondary schools. The other half satisfy their obligation either wholly through the voucher program, or by operating some schools—usually elementary —and paying tuition for pupils to attend those schools which the school districts do not operate. *Id.* at 3.

Prior to 1981, sectarian private schools were eligible to participate in the Maine voucher program. In 1981, however, the Maine Legislature made such schools ineligible for the program by amending the governing statute to provide that "[a] private secondary school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2). This statutory amendment was in response to an opinion by the Maine Attorney General that the inclusion of sectarian schools in the voucher program violated the Establishment Clause of the First Amendment. Pet. App. at 3-4.

Petitioners are the parents of children residing in the Raymond School District ("Raymond"), which does not operate a public high school, but instead provides sec-

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[1] If a school district elects to fulfill its statutory obligation through the voucher program, it pays the tuition directly to the public or approved private school in question. Pet. App. at 2-3.

ondary education through the voucher program. In 1997 —some sixteen years after the voucher program had been amended specifically to exclude sectarian private schools— petitioners enrolled their children at Cheverus High School —a pervasively sectarian private school operated by the Society of Jesus—and demanded that Raymond pay the tuition. When Raymond refused—citing the voucher program's specific exclusion of sectarian private schools— petitioners brought suit in state court against Raymond, the Maine Department of Education, and the Commissioner of Education, asserting, *inter alia*, that their rights under the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution had been infringed by Raymond's refusal to pay the tuition. *Id.* at 4-6.[2]

B. Proceedings Below

The trial court granted motions for summary judgment by defendants and intervening defendants, and petitioners appealed as of right to the Supreme Judicial Court of Maine. That court framed the issues before it on appeal as follows:

> This appeal presents a unique question, requiring that we articulate with precision the issues before us. Unlike most recent cases addressing educational programs that provide state funding for religious schools, we are not called upon to determine whether a particular program in which state funds benefit religious schools violates the Establishment Clause.

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[2] Petitioners also claimed a violation of their rights under the Maine Constitution. The court below found that the Maine Constitution was co-extensive with the United States Constitution in all relevant respects, Pet. App. at 8, and thus framed the issues presented solely in terms of whether the Maine voucher program violated the latter constitution.

> Instead, we are presented with the opposite question: whether a tuition program that specifically excludes religious schools violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First Amendment; or the Equal Protection Clause of the Fourteenth Amendment. These distinctions are critical to our analysis. [*Id.* at 6-7 (footnote omitted).]

The court below gave short shrift to petitioners' Free Exercise Clause claim. The Maine voucher program does not violate that Clause, the court found, because " '[t]he fact that government cannot exact from [a citizen] a surrender of one iota of [her] religious scruples does not, of course, mean that [she] can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' " *Id.* at 14 (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)) (brackets by court). Nor was the court below at all impressed by petitioners' Establishment Clause claim, noting that that Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." Pet. App. at 17.

Although the Maine Supreme Court concluded that petitioners' claim that the voucher program violated the Equal Protection Clause "present[ed] an important issue worthy of evaluation," *id.* at 19, it ultimately rejected that claim as well. The court's stated reason was that Maine has a constitutionally-valid justification for excluding sectarian private schools from its voucher program, inasmuch as *the inclusion* of such schools in the program would violate the Establishment Clause. *Id.* at 18-46.

Justice Clifford dissented from that portion of the lower court's ruling rejecting petitioners' Equal Protection Clause claim, being of the view that "a more narrowly tailored tuition program could be created that would lessen the discrimination based on religion, while still complying with the Establishment Clause." *Id.* at 53.

C. The First Circuit's Subsequent Decision in *Strout v. Albanese*

Approximately one month after the Maine Supreme Court's decision in this case, the United States Court of Appeals for the First Circuit decided *Strout v. Albanese,* 178 F.3d 57 (1st Cir. 1999), which involved a virtually-identical (and contemporaneous) constitutional challenge to Maine's voucher program.[3] The First Circuit majority saw the case in precisely the same terms as did the Maine Supreme Court, and ruled accordingly. *See* 178 F.3d at 60-65. But Judge Campbell wrote separately to state his view that—in rejecting plaintiffs' Equal Protection Clause claim—there was "no need whatever to reach out and decide the thorny . . . issue" of whether the inclusion of sectarian private schools in the voucher program would violate the Establishment Clause. *Id.* at 68 (Campbell, J., concurring). In explaining that view, Judge Campbell stated:

> I see the Maine Legislature, in 1981 and to this moment, as having rationally and prudently excluded sectarian schools because of a well-founded concern —whether or not ultimately correct—that to do otherwise will or may violate the establishment clause.

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[3] The one notable difference was that in the federal court lawsuit plaintiffs added substantive due process and free speech claims to their Free Exercise. Establishment, and Equal Protection Clause claims. These additional claims were rejected "out of hand" by the First Circuit. 178 F.3d at 65-66.

> The existence of that fear is rational enough, I think, to meet equal protection (and free exercise) requirements, however defined. [*Id.*]

REASONS FOR DENYING THE WRIT

THE INSTANT CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE ESTABLISHMENT CLAUSE QUESTION RAISED BY VOUCHER PROGRAMS THAT INCLUDE SECTARIAN PRIVATE SCHOOLS

Petitioners indicate that "school choice programs" that allow pupils to attend private schools—including sectarian private schools—at taxpayer expense recently have been enacted in Wisconsin, Ohio and Florida, Petition for a Writ of Certiorari ("Pet.") at 22-23, that "serious [*albeit* unsuccessful] efforts to enact school choice programs occurred in a number of other states this past year, including Pennsylvania, New Mexico, and Texas," *id.* at 23, and that "concerns" about whether "the inclusion of religious choices is constitutionally permissible . . . make it difficult for conscientious legislators to know what to do." *Id.* Petitioners conclude that "[t]he conflicting jurisprudence among various state and federal courts on [the] important question [of whether and under what circumstances public funds can be used to pay for pupils to attend sectarian private schools] necessitates resolution by this Court." *Id.* at 25.

There can be no serious dispute on this latter score. Indeed, in the Petition for a Writ of Certiorari that was filed with this Court on August 31, 1998 in *Jackson v. Benson,* No. 98-376 ("*Jackson* Pet."), the *opponents* of the Wisconsin voucher program asserted that resolution of this question "is central both to the development of this Court's Establishment Clause jurisprudence and to

the formulation of this nation's education policy . . . ." *Jackson* Pet. at 9. The dispositive question for present purposes, however, is not whether this Court should resolve the important Establishment Clause question raised by voucher programs that include sectarian private schools. We submit that the answer to this question clearly is "yes."[4] The question is rather whether the instant case provides an appropriate vehicle for doing so. As we demonstrate below, the answer to this latter question just as clearly is "no."

A. This Case Does Not Involve A Program Pursuant To Which Public Funds Are Used To Pay For A Sectarian Private School Education

We begin with the fact that—unlike *Jackson v. Benson*, and the Ohio and Florida cases referenced in the Petition, *see* Pet. at 15-16, 23—this case does not even involve a program pursuant to which public funds are used to pay for pupils to attend sectarian private schools, and, as such, does not directly present the question of whether such a program violates the Establishment Clause. The court below put the point as follows:

> [W]e are presented with the opposite question: whether a tuition program that *specifically excludes religious schools* violates any of three constitutional provisions: the Establishment Clause of the First Amendment; the Free Exercise Clause of the First

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[4] This Court already addressed this question in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), striking down on Establishment Clause grounds a New York voucher program. In suggesting that there is a need for further guidance from this Court, it was the position of petitioners in *Jackson v. Benson* and of respondents here that this Court should grant review in order to reaffirm that *Nyquist* is still good law.

> Amendment; or the Equal Protection Clause of the Fourteenth Amendment. [Pet. App. at 7 (emphasis added).]

The consequences of this distinction are, as the court below recognized, "critical to our analysis." *Id.* Because the Maine statute does *not* provide for public funding of sectarian private school education, there is no basis for applying the largely fact-based criteria that were found to be determinative by this Court in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973)—*i.e.*, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . and finally, the statute must not foster 'an excessive government entanglement with religion,'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Nor is there a factual record on the basis of which to determine whether and to what extent such a use of public funds is in compliance with the "safeguards" that informed this Court's decision in *Agostini v. Felton*, 521 U.S. 203, 235 (1997).

The court below put this point in sharp focus with regard to the question of excessive entanglement:

> We could not, however, make a final determination on this issue on the record before us. Because the tuition program has not included religious schools for the past 18 years and has therefore not encountered problems of entanglement, neither the rules nor the practical application of the statutory requirements were addressed in detail in the Superior Court.[35] [Pet. App. at 43.]

In the accompanying footnote—fn. 35—the court added:

> Ordinarily, a court undertaking an entanglement analysis does so in the context of reviewing a state

> program that *does provide* aid to a religious institution. [(Emphasis in original).]

Even the dissenting Justice in the court below (Justice Clifford) acknowledged the need to look to the specific terms under which public funds are made available to pay for a sectarian school education in order to determine whether "Establishment Clause violations may be avoided by a tuition program that does not entirely exclude religious schools," suggesting that the answer might be "yes" if the voucher program "provides more limited tuition with reasonable restrictions conditioning the use of that aid." Pet. App. at 52. To illustrate the point, Justice Clifford opined that "[a] tuition program with similar or greater restrictions and conditions [than the voucher program sustained by the Wisconsin Supreme Court in *Jackson v. Benson*] could be fashioned within the framework of the current [Maine] statute with very little effort on the part of the State." Pet. App. at 53. Justice Clifford outlined this hypothetical voucher program as follows:

> Tuition in less substantial amounts could be authorized to benefit parents of children in religious schools. The tuition aid could be directed through the parents to avoid restrictions on direct aid and the State could require participating schools to accept an "opt-out" provision. In addition to the restrictions set forth in the Wisconsin program, the State could adopt reasonable conditions and restrictions on the use of the State aid, insuring that the moneys would not be used to directly subsidize the religious functions of the schools, avoiding both direct aid of religion and excessive entanglement of the State in religion. [*Id.*]

The important point for present purposes is not whether Justice Clifford's hypothetical voucher program would

pass constitutional muster, but his recognition of the fact that this question cannot be answered in the abstract.[5]

Petitioners, on the other hand, fail to grasp this critical distinction between what is and what might be. Thus, they repeatedly refer in their Petition not to the Maine voucher program that in fact is before this Court, but rather to the program that would be at issue *if the Maine Legislature had decided to include sectarian private schools*, and the latter program had been challenged as violative of the Establishment Clause. *See, e.g.*, Pet. at 12 ("The Maine program, however, is similar to the programs in *Everson* and *Allen* in that it benefits all students and epitomizes precisely the sort of neutral program this Court made a specific point of not foreclosing in *Nyquist*."); *id.* at 18 ("Maine's tuitioning system is the epitome of such a neutral, choice-driven system . . . .").

We need not belabor the point. The answer to the question of whether and under what circumstances public funds can be used to pay for a sectarian private school education is, as petitioners assert, "central both to the continued development of this Court's First Amendment jurisprudence and to vital efforts being undertaken in many states to improve elementary and secondary education." Pet. at 11. *See also Jackson* Pet. at 9 ("That question is central both to the development of this Court's Establishment Clause jurisprudence and to the formulation of this nation's edu-

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[5] Compare the following observation in the majority opinion below:

> While it may be possible for the Legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not easily be tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion. *It is up to the Legislature, not the courts, to determine whether and how to attempt to structure such a program.*[1] [Pet. App. at 45 (emphasis added).]

cation policy . . . ."). But this important constitutional question should be answered in a case that involves a program that *does in fact* provide financial aid to sectarian private schools, and that comes to this Court with an appropriate factual record for constitutional analysis. This is clearly not such a case.

B. The Conclusion Of The Court Below That The Inclusion Of Sectarian Private Schools In Maine's Voucher Program Would Violate The Establishment Clause Was Not Necessary To The Disposition—And Rejection —Of Petitioners' Equal Protection Clause Claim

Petitioners formulate the Question Presented as follows:

> Does the establishment clause of the U.S. Constitution require the exclusion of religious schools from Maine's tuitioning program, which allows parents to choose from an array of public and private schools for their children's education?

This formulation is at best misleading because it implies that the "holding" of the Maine Supreme Court is bottomed on the Establishment Clause, and that the Petition seeks review of that holding. But this is not so, and it is important to make clear precisely how the Establishment Clause factors into the lower court's decision.

Petitioners contended in the court below, *inter alia*, that the Maine voucher program violates the Establishment Clause because it excludes sectarian private schools. The Maine Supreme Court summarily disposed of that claim, holding that that Clause "has no role in requiring government assistance to make the practice of religion more available or easier. It simply does not speak to governmental actions that fail to support religion." Pet. App. at 17. That is the *only Establishment Clause hold-*

ing in this case, and petitioners do not challenge it before this Court.[6]

The Establishment Clause also came into play in the lower court's analysis of petitioners' Equal Protection Clause claim. The court rejected that claim because it concluded that Maine had a constitutionally-valid justification for excluding sectarian private schools from its voucher program—*i.e.*, that the inclusion of such schools would violate the Establishment Clause. Pet. App. at 18-46. Petitioners do not—at least in terms—ask this Court to review the lower court's rejection of their Equal Protection Clause claim, but rather to determine whether the *reason* given by the court for that rejection was proper. We submit that this Court should deny that request, inasmuch as the position taken by the court below *vis-à-vis* the Establishment Clause was not necessary to its disposition—and rejection—of petitioners' Equal Protection Clause claim.

1. Although the bulk of the lower court's decision was devoted to petitioners' Equal Protection Clause claim, *see* Pet. App. at 18-45, its entire analysis was conducted in an *arguendo* context. The court noted at the outset that petitioners' "argument turns . . . on the fact that the State chooses to include private schools in the tuition program but excludes private religious schools." *Id.* at 19. The court then indicated that petitioners lacked standing to make this argument, and that this in and of itself was sufficient reason to reject their Equal Protection Clause claim:

> In essence, the parents claim that Cheverus [High School] is treated differently because it is a religious school, not that the parents are treated differently

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[6] Petitioners likewise do not challenge the lower court's holding that their Free Exercise Clause claim is meritless.

> because they are Catholic. Ordinarily, the Equal Protection claim here would be asserted, not by potential clients of the excluded institution, but by the school itself.[ ] Cheverus, however, is not party to this action. [*Id.*]

Because the court "conclude[d] that the parents present an important issue worthy of evaluation," it nonetheless proceeded to "assess the parents' Equal Protection argument assuming *arguendo* that the parents' lack of opportunity to have the State pay the tuition for their children to attend a private religious school results in *their own* disparate treatment on the basis of their religion." *Id.* (emphasis in original).

In short, the conclusion of the court below that petitioners lacked standing to make their Equal Protection Clause argument provides an independent basis for sustaining the court's judgment.

2. Even if we go further, and consider the lower court's Equal Protection Clause analysis on its own terms, the court's determination that the inclusion of sectarian private schools in Maine's voucher program would violate the Establishment Clause—although correct—was not in any event necessary to the disposition—and rejection—of petitioners' Equal Protection Clause claim. As we now show, that claim should have been rejected—as we urged below—on the basis of this Court's summary affirmances of the three-judge district court decisions in *Brusca v. Missouri*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), and *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).[7]

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[7] A summary disposition by this Court is, of course, no less of a controlling precedent in the lower courts then a plenary disposition. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Brusca involved a federal constitutional challenge to provisions of the Missouri Constitution and implementing statutes providing for the funding of a system of free public education, while at the same time barring all forms of tuition assistance to parents wishing to send their children to sectarian private schools. 332 F. Supp. at 276. Like petitioners here, the parents in *Brusca* argued that tuition assistance by the State would not violate the Establishment Clause, and that, therefore, the State "den[ied] them the equal protection of the laws" by refusing such assistance while providing its equivalent to parents utilizing the public schools. *Id.* The *Brusca* court rejected this analytical approach, stating that "[t]he issue presented . . . is not so much what Missouri *may* do [consistent with the Establishment Clause,] but what it *must* do in aid of religious education." *Id.* (emphasis in original). Viewing the issue in those terms, the court summarily rejected the parents' Equal Protection Clause claim, finding that traditional rational basis scrutiny applied, and that there was "nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction." *Id.* at 279.

Luetkemeyer involved a constitutional challenge to "those statutes of the State of Missouri which provide for transportation of public school pupils to and from school but which do not provide like transportation for the pupils of church-related schools." 364 F. Supp. at 377. Given this Court's decision in *Everson v. Board of Education*, 330 U.S. 1 (1947), it was conceded *in Leutkemeyer* that the Establishment Clause did not prevent Missouri from providing "like transportation for the pupils of church-related schools." As in *Brusca*, however, the *Luetkemeyer* court found that cases defining the prohibitive scope of the Establishment Clause "did not relate to the [Equal Protection Clause] question presented," inas-

much as "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." 364 F. Supp. at 381 (emphasis in original). And, like the *Brusca* court, the *Luetkemeyer* court rejected the parents' Equal Protection Clause claim. Applying rational basis scrutiny, the court found nothing "irrational" about "the State of Missouri's decision to promote the separation of church and state by refusing to provide school bus transportation to church-sponsored school pupils when it does provide that service to public school pupils." *Id.* at 382.

Brusca and *Luetkemeyer* stand for the proposition that a state constitutional or statutory provision excluding sectarian private schools from an otherwise "neutral" educational program does *not* run afoul of the Equal Protection Clause—without regard to whether a different state constitutional or statutory provision including sectarian private schools in the program would violate the Establishment Clause.[8] That being so, the decision of the court below rejecting petitioners' Equal Protection Clause claim was correct, without regard to the correctness *vel non* of the Establishment Clause reasoning that led the court to that decision.

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[8] Contrary to the finding of the court below, *see* Pet. App. at 19-22, *Brusca* and *Luetkemeyer* also stand for the proposition that rational basis scrutiny applies in this context. *Compare Strout, supra*, 178 F.3d at 67 ("Because plaintiffs' attempt to use the establishment clause as a sword fails, and because the Maine statute does not, for the reasons stated by my colleagues, violate the free exercise clause, no fundamental right is implicated here for equal protection purposes. Thus, the proper level of scrutiny under the equal protection clause is the most deferential—rational basis review.") (Campbell, J., concurring). This point is particularly well-taken here in light of the lower court's discussion of standing, and its conclusion that petitioners themselves have *not* been treated differently on the basis of their religion. Pet. App. at 9.

Petitioners contend that resolution of the Establishment Clause question presented *was* necessary to the lower court's Equal Protection Clause decision because—as that court found—the *actual* legislative purpose behind the "1981 exclusion" of sectarian private schools from the Maine voucher program was "avoiding an establishment clause violation." Pet. at 11 & n.11 (citing Pet. App. at 24). But that contention is without merit.

As a general rule, a state statute will survive rational basis scrutiny under the Equal Protection Clause if there is any "conceivable" legislative purpose that supports the challenged classification, and it is "entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-15 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 364 (1973)). An exception to that rule exists when the legislature has " 'specifically declared [its] purpose' " and *that* declared purpose is found to have been irrational, *see Nordlinger v. Hahn*, 505 U.S. 1, 16 n.7 (1992) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959)), but that exception does not save petitioners here. Petitioners do not—and cannot—claim that *the 1981 Maine Legislature* acted "irrationally" when it excluded sectarian private schools from the voucher program for the purpose of avoiding an Establishment Clause violation. As the court below found:

> The Legislature enacted the exclusion in 1981 in direct response to developments in Establishment Clause jurisprudence during the 1970's. Placing those developments in a historical context demonstrates that the Legislature had little choice but to adopt the exclusion if it chose to continue its tuition program. [Pet. App. at 24.]

Petitioners' Equal Protection Clause claim, simply put, is that the exclusion of sectarian private schools from Maine's voucher program *no longer* has a rational basis *today*, in light of a post-1981 line of Establishment Clause decisions by this Court culminating in *Agostini v. Felton*, 521 U.S. 203 (1997). *See* Pet. at 13; *see also* Pet. App. at 28 ("The parents urge us to conclude . . . that recent changes in the Supreme Court's analysis of the Establishment Clause have resulted in the elimination of the necessity for the religious exclusion."). In this context, the only *actual* legislative purposes that conceivably could be relevant to the Equal Protection Clause inquiry are the purposes of *the current Maine Legislature* in *maintaining* the exclusion of sectarian private schools in the face of these post-1981 jurisprudential developments. But so far as the record shows, the current Maine Legislature has made no declaration of its actual purposes in that regard.

It is possible, of course, to speculate as to what those actual purposes might be—as we do in the margin.[9] But

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[9] One possibility is that the Maine Legislature's attitude regarding the separation of church and state has changed since 1981, to the point where the Legislature does not wish, as a policy matter, to include sectarian private schools in the voucher program, even assuming *arguendo* that to do so no longer would violate the Establishment Clause. *Cf. Brusca*, 332 F. Supp. at 277; *Leutkemeyer*, 364 F. Supp. at 383. A second possibility is that the Maine Legislature has analyzed this Court's recent Establishment Clause cases and is of the view that those cases do not indicate that sectarian private schools could be included in the program consistent with the Establishment Clause. And, a third possibility is that the Maine Legislature has analyzed the recent cases and considers the Establishment Clause issue as a close one, but chooses not to have the Maine voucher program be the "test case" on that issue.

Petitioners assert that "[i]n the absence of any need to avoid a violation of the establishment clause, Maine lacks any legitimate basis for interfering with families' ability to choose a religious education for their own children." Pet. at 22. Petitioners once again miss the point. Maine is not in any sense "interfering with

in the absence of record evidence on that point, the only question that genuinely is relevant to the disposition of petitioners' Equal Protection Clause claim is whether there is *any "conceivable" rational justification* for Maine's continued exclusion of sectarian private schools from its voucher program. *Brusca* and *Leutkemeyer* definitively answer that question "yes." That being so, the court below should summarily have rejected petitioners' Equal Protection Clause claim, without reaching out to decide whether the inclusion of sectarian private schools in the voucher program would run afoul of the Establishment Clause.[10]

* * * *

The question of whether and under what circumstances public funds may be used to pay for pupils to attend sectarian private schools without violating the Establishment Clause is an important one—too important, we submit, to be addressed by this Court in the muddled, hypothetical posture in which it is presented here. There are, as petitioners point out, several pending cases chal-

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families' ability to choose a religious education for their own children." The question is whether—apart from the "need to avoid a violation of the establishment clause"—the State has "any legitimate basis for" refusing *to pay for* such a religious education. As we demonstrate above and in text, it most assuredly does.

[10] Although the foregoing analysis leads us to the same conclusion as Judge Campbell in *Strout v. Albanese*—*i.e.*, there is "no need whatever" to decide the Establishment Clause question presented, 178 F.3d at 68—we feel obliged in the interest of completeness to note that even Judge Campbell missed the point to a degree. Judge Campbell "s[aw] the Maine Legislature, in 1981 *and to this moment*," as being motivated by a wholly rational fear that the inclusion of sectarian private schools in the voucher program would or might violate the Establishment Clause. *Supra* p. 5 (emphasis added). It is, of course, possible that that is the current Maine Legislature's actual motive, but there are other possibilities as well, and the record is silent on the point. *See supra* p. 17 & n.9.

lenging on Establishment Clause grounds state programs that do provide public funds to pay for sectarian school education, and that present the Establishment Clause question in direct and pristine form. *See Pet.* at 22-24.[11] One need not be omniscient to recognize that one or more of these pending cases is likely to provide this Court with a far more appropriate vehicle for clarifying the constitutional parameters of the unfolding debate over voucher programs.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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11 Contemporaneously with the filing of the Petition, two additional lawsuits were filed in federal district court challenging—strictly on Establishment Clause grounds—Ohio's "reauthoriz[ation]" (Pet. at 16 n.15) of its voucher program for the City of Cleveland. *See Simmons-Harris v. Zelman*, No. 99-1740 (July 20, 1999 N.D. Ohio); *Gatton v. Zelman*, No. 99-1818 (July 29, 1999 N.D. Ohio). These two cases were consolidated, and on August 24, 1999, the federal district court preliminarily enjoined implementation of the new program. On August 27, 1999, the district court issued a partial stay of the preliminary injunction, and expedited the hearing on a permanent injunction.